87-1938

No. 87-

In the Supreme Court of the United States

OCTOBER TERM, 1987

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the court below vitiated the holding of this Court in *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959)–and failed its duty to protect exclusive Federal jurisdiction to interpret and supervise motor carrier operating authority issued by the Interstate Commerce Commission–by declining to enjoin an ongoing State prosecution against operations authorized by the ICC (pending Federal judicial review of the ICC's decision).

PARTIES TO THE PROCEEDING

The following parties have appeared in the proceedings before the Court of Appeals below:

State of Texas
Montana Department of Public Service Regulation
Montana Public Service Commission
Public Utilities Commission of the State of California
Alabama Public Service Commission
Great Western Trucking Co., Inc.
Steere Tank Lines, Inc.
National Association of Regulatory Utility Commissioners
The National Industrial Transportation League
Regular Common Carrier Conference
International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America
National-American Wholesale Grocers' Association
National Motor Freight Traffic Association
Armstrong World Industries, Inc.
Reeves Transportation Company of Georgia
Interstate Commerce Commission
United States of America

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Interstate Commerce Commission petitions for a writ of certiorari to review, and summarily reverse, the decision of the United States Court of Appeals for the Fifth Circuit denying its Motion for Preliminary Injunction.

OPINIONS BELOW

The opinion of the circuit court (App. A, 1a-6a, *infra*) is reported at 837 F.2d 184 (1988). The order denying rehearing (App. B, 7a, *infra*) is unreported, and the court's rejection of a request for *en banc* consideration was transmitted by letter (App. C, 8a, *infra*).

JURISDICTION

The judgment of the circuit court was entered February 1, 1988; the order denying rehearing was entered March 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] The Solicitor General has not authorized the filing of this petition. The ICC is authorized to file this petition under 28 U.S.C.

STATUTES INVOLVED

Pertinent provisions of the United States Constitution, Art. I, sec. 8, cl. 3 (Commerce Clause) and Art. VI, cl. 2 (Supremacy Clause); the All Writs Act, 28 U.S.C. 1651; the Administrative Orders Review Act, 28 U.S.C. 2342 and 2349; and the Interstate Commerce Act, 49 U.S.C. 10521 and 10921 are set forth in Appendix D (9a-11a), *infra*.

STATEMENT OF THE CASE

1. The Interstate Commerce Commission has jurisdiction over *inter*state transportation by motor carriers. 49 U.S.C. 10521(a)(1)(A). To conduct such operations, a carrier must obtain an appropriate certificate from the ICC pursuant to 49 U.S.C. 10921. States retain authority to regulate wholly *intra*state transportation. 49 U.S.C. 10521(b)(1).

In the event of a dispute over whether particular operations are part of interstate transportation licensed by the ICC or constitute intrastate transportation for which State authority is required, this Court has held that the interpretation of the carrier's interstate authority should be made by the ICC[2] *before* the State attempts to prosecute a carrier for unlawful intrastate transportation. *Service Storage & Transfer Co., Inc. v. Virginia*, 359 U.S. 171 (1959). *Accord, Jones Motor Co., Inc. v. Pennsylvania Public Utility Comm'n*, 361 U.S. 11

2323 and 2348, as recognized by this Court in *United States v. Providence Journal Co.*, 56 U.S.L.W. 4366, 4370 n.9 (U.S. May 2, 1988), citing Stern, "Inconsistency" in Government Litigation, 64 Harv. L. Rev. 759 (1951).

[2] The ICC is the proper forum for interpreting Federal motor carrier licenses, *Nelson, Inc. v. United States*, 355 U.S. 554, 558 (1958), and may do so through declaratory orders. See *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959).

(1959) (summarily reversing a State court judgment on the basis of the *Service Storage* principle).

2. This litigation stems from an ICC proceeding (begun in March 1985) in which a motor carrier (and one of its shippers) sought a declaratory order that its ICC license authorizes it to conduct certain operations within Texas as part of interstate transportation. The State of Texas intervened as an opposing party before the ICC.

Despite the pendency of the ICC proceeding, in October 1985 Texas instituted an enforcement action against the carrier and shipper in Texas State court.[3] In that action Texas claims that the same operations constitute unlawful *intra*state transportation.

In April 1986 (and again in August 1987), the ICC declared that the operations at issue are part of *inter*state transportation authorized by an ICC certificate.[4] Pursuant to the Administrative Orders Review Act (28 U.S.C. 2341, *et seq.*) (also known as the Hobbs Act), Texas filed a timely petition for review of the ICC's determination in the court below (U.S.C.A. 5th Cir., 87-4725).[5]

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[3] *The State of Texas v. E&B Carpet Mills, a Division of Armstrong World Industries, Inc., and Reeves Transportation Company of Georgia,* No. 386,524 (353d Texas Judicial District).

[4] *Armstrong World Industries, Inc.–Transportation Within Texas–Petition for Declaratory Order,* 2 I.C.C.2d 63 (1986) (App. E, 12a-31a, *infra*), *aff'd on administrative appeal,* not printed (served August 25, 1987) (App. F, 32a-47a, *infra*).

[5] Briefing in the case was completed in May 1988, but oral argument has not yet been scheduled. Texas has filed a motion in the case seeking consolidation with, or argument at the same time as, *State of Texas v. Interstate Commerce Comission,* No. 88-1223 (U.S.C.A., 5th Cir.) (appealing a partial denial of a Freedom of Information Act request), a case in which no briefing schedule has yet been set.

Shortly thereafter, in November 1987, the ICC sought a preliminary injunction in the Hobbs Act case against further State prosecution. We asked the court to issue the injunction pursuant to the All Writs Act, 28 U.S.C. 1651, in aid of the court's appellate jurisdiction over the ICC case.[6] We argued, on the basis of *Service Storage, supra,* that the parallel State court action is improper and that only Federal remedies are available to Texas.[7]

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[6] The carrier and shipper have sought similar injunctive relief against the State prosecution in a complaint filed in August 1986 in United States District Court, *E&B Carpet Mills v. Mattox, et al.,* Civ. No. A-86-CA-446 (W.D. Tex.) (in which the ICC has intervened). They also sought a preliminary injunction *pendente lite.* In October 1986, the District Court denied the request for preliminary injunction. The District Court did not address the likelihood of success on the underlying *Service Storage* claim. Rather, it found that irreparable harm had not been shown. (App. G, 48a-50a, *infra.*) We believe that the District Court's decision was based on the fact that the State court proceeding was held in indefinite abeyance at the time in light of the ICC proceeding. Moreover, the District Court only addressed the potential harm to the plaintiffs' private interests; it did not focus on harm to Federal interests.

In October 1987, upon learning that the State court case had been reactivated (and set for trial to begin in early December 1987), the ICC filed its own motion for a preliminary injunction *pendente lite* in the District Court case. Despite a request for expedited consideration (by November 1987), the District Court has yet to rule on either the ICC's motion or the underlying suit. Given the ruling by the Fifth Circuit here that the State action can proceed independently, it is now doubtful that any relief from the lower court will be forthcoming or could be efficacious in the Fifth Circuit.

[7] We explained that if the State disagrees with the *factual* predicate of the ICC's decision, its recourse is to file a complaint with the ICC (or in Federal district court) demonstrating any materially different facts. The State's disagreement with the ICC's *legal* conclusion is being pursued in the Fifth Circuit case. But the State cannot elect to disregard pre-eminent Federal jurisdiction and the preemptive nature of the Commission's decision.

The court denied the motion for preliminary injunction[8] and also a petition for rehearing.[9] The court ruled that its jurisdiction to review the ICC decision would not be impinged because the State court lacks authority to review the ICC decision and cannot bind the Federal court. (App. A, 4a, *infra.*) The court further found no reason why the parallel State and Federal cases may not both proceed independently, since any conflict between the two may ultimately be resolved by this Court on certiorari.[10] (*Id.*)

In a recent development, the State court has granted summary judgment to the State and permanently enjoined the operations at issue. (App. H, 51a-53a, *infra.*)

REASONS FOR GRANTING THE PETITION

1. This case is of exceptional importance. At stake is the Federal authority vested in the Interstate Commerce Commission to interpret the licenses that it has issued and, correlatively, the Federal government's preemptive power to determine whether disputed operations may be conducted while their validity is being resolved.

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[8] *State of Texas v. United States,* 837 F.2d 184 (5th Cir. 1988) (App. A, 1a-6a, *infra*).

[9] App. B, 7a, *infra.* In addition the Fifth Circuit rejected a request for *en banc* consideration, on the ground that the full court does not consider decisions that are not dispositive of the case. (App. C, 8a, *infra.*)

[10] Indeed, the court below specifically stated that even if it had *already* affirmed the ICC's decision (meaning that the transportation is interstate and thus beyond the State's authority to regulate), it would not be compelled to enjoin the State prosecution. (App. A, 4a, *infra.*)

The holding of this Court in *Service Storage, supra*– that there cannot be concurrent ICC and State court litigation as to whether particular transportation is interstate or intrastate, and that such disputes must be litigated in the Federal arena–would be vitiated if the Court of Appeals decision is allowed to stand. The court below reasoned that the State court determination can ultimately be reviewed by this Court (on certiorari) "as was the case in *Service Storage* . . ." (App. A, 4a, *infra*). But if the *Service Storage* litigation must be repeated any time a State seeks to challenge operations conducted under color of a Federal certificate, there would be nothing left to this Court's holding there.

Permitting the State action to go forward, regardless of the ultimate outcome of either the Federal or State litigation, severely damages the Federal role in motor carrier licensing. It allows State prosecutors to enforce their own interpretation in contravention of clear Federal supremacy.[11] A State should not be permitted to usurp the Constitutional power of the Federal government under the Commerce Clause.[12] Accordingly, a State obstacle to the fulfillment of Congressional purpose relating to interstate commerce must be re-

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[11] U.S. Const. Art. VI, cl. 2. *McCullough v. Maryland*, 17 U.S. 316, 405-06 (1819) (State officials and State courts are bound by Federal law); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 653 F. Supp. 617 (W.D. Tex. 1987) (Federal courts are to guard against overly zealous State prosecutions in areas occupied by Federal law).

[12] U.S. Const. Art. I, sec. 8, cl. 3. *Northern Natural Gas Co. v. State Corporation Commission*, 372 U.S. 84, 92 (1963); *City of Chicago v. Atchison, Topeka & Santa Fe Railway*, 357 U.S. 77 (1958); *Middle South Energy v. Ark. Public Serv. Comm'n*, 772 F.2d 404, 413 (8th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 884 (1986).

moved.[13]

The very existence of a State enforcement action undermines the stability of the Federal regulatory program and the ability of carriers and shippers alike to rely on Federally-issued certificates.[14] Carriers and shippers should not be subjected to the uncertainty of litigation in more than one forum and the intimidation of prosecution in State courts for conducting Federally-authorized operations. Nor should the States be allowed to impede or disrupt Federally-authorized operations.

Allowing a State prosecution to proceed enables State authorities to shut down operations, whether through intimidation (by the threat of fines and penalties) or (as in this case) direct court order despite an express ICC determination that the operations are within exclusive Federal jurisdiction. Thus, it affords State officials a *de facto* veto power over the operation of Federally-licensed carriers.

In short, the damage to the Federal regulatory system is both immediate and irreparable. The potential adverse consequences extend beyond this case, affecting other carriers operating in Texas[15] and in other States.[16] The burden of defending against a State pros-

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[13] The concept of comity "is not strained when a federal court cuts off state proceedings that entrench upon the federal domain." *Middle South Energy, supra,* 772 F.2d at 417.

[14] See *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311 (1981).

[15] See, *e.g. State of Texas v. The Quaker Oats Company,* No. 411,633 (98th Texas Judicial District), where the State is prosecuting another carrier and shipper for conducting an operation that the ICC has declared to be part of lawful interstate transportation.

[16] The Commission has received several recent requests to resolve disputes over whether particular transportation is in-

ecution, the uncertainty which would result from potentially differing State and Federal interpretations, and the prospect of having disputed operations shut down during the pendency of protracted litigation, will discourage carriers from conducting any Federally-licensed operations of which a State disapproves. *Service Storage, supra,* at 177-78.

2. In drawing a distinction between *agency* and *court* jurisdiction over the same case (App. A, 4a, *infra*), the court below failed to recognize that the ICC's jurisdictional grant is *shared* by the reviewing court. See 28 U.S.C. 2349. Judicial review is not a separate and independent process, but is inextricably intertwined with the administrative process. *Morgan v. United States,* 307 U.S. 183, 191 (1939). Thus, the court below should have acted to ensure that a State court action does not interfere with or usurp the Federal government's Constitutionally founded role in interstate transportation, which is executed by the ICC and is subject only to *Federal* court review.[17]

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terstate or intrastate, and thereby protect the parties involved from potential prosecutions in other States, *e.g.*, No. MC-C-10999, *Matlack, Inc.–Transportation within Missouri–Petition for Declaratory Order;* No. MC-C-30006, *The Quaker Oats Company–Transportation Within Texas and California–Petition for Declaratory Order,* or from State regulatory proceedings, No. MC-C-10917, *Funbus Systems, Inc.–Intrastate Operations–Petition for Declaratory Order* (California).

[17] It is clear that the court below has the power to halt the State prosecution, thereby ensuring that the disputed operations may be conducted while the ICC's determination (that they are Federally-authorized) is under review. See *FTC v. Dean Foods Co.,* 384 U.S. 597, 604 (1966) (All Writs Act empowers appellate courts to "maintain the *status quo* by injunction pending review of an agency's action"), quoting from *Arrow Transp. Co. v. Southern R. Co.,* 372 U.S. 658, 671 n.22 (1963); *Tampa Phosphate R. Co. v. Seaboard*

3. Interlocutory review is appropriate here because denial of the preliminary injunction "finally determine[d] claims of right separable from, and collateral to, rights asserted in the [still pending] action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." [18] *Gulfstream Aerospace Corporation v. Mayacamas Corporation,* 56 U.S.L.W. 4243, 4245 (U.S. Mar. 22, 1988), quoting from *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541 (1949). Indeed, interlocutory review is imperative because otherwise the carrier is prohibited by the State court's order from utilizing its Federal license.[19]

Moreover, granting interlocutory certiorari here will conserve judicial resources (at both the State and Federal level) by avoiding unnecessary litigation and piecemeal petitions for certiorari.[20] Thus, the purpose of

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Coast Line R. Co., 418 F.2d 387 (5th Cir. 1969), *cert. denied,* 397 U.S. 910 (1970) (upholding an injunction against State court action that undercut Federal transportation regulation).

[18] The decision that there can be independent State prosecution is entirely separate from and collateral to the issue in the pending Circuit Court case (*i.e.,* whether the ICC properly interpreted its certificate), as the court below recognized (see n.10, *supra*). Review now is essential to uphold the Federal system established by the Commerce Clause of the Constitution and to secure the uniformity of decision-making envisioned by *Service Storage.* Deferring review would eviscerate the *Service Storage* principle by permitting exactly what that case disallowed – concurrent State prosecution.

[19] This result should not be tolerated. See, *Construction Laborers v. Curry,* 371 U.S. 542 (1963) (overturning State court injunction against the exercise of Federal rights within NLRB jurisdiction).

[20] The approach taken by the court below would burden this Court (particularly if followed elsewhere) by requiring action on individual petitions for certiorari (as in *Jones Motor, supra*) in each

the general policy discouraging interlocutory review[21] will be promoted by exercising this Court's oversight function now to correct a fundamental misconception of *Service Storage* and of the lower courts' responsibility to protect exclusive Federal jurisdiction. See *Amer. Const. Co. v. Jacksonville Railway,* 148 U.S. 372, 383 (1893) (purpose of requiring finality is to lighten Court's litigation burden; interlocutory certiorari is appropriate "in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.").[22]

4. The error in the decision by the court below, in failing to uphold the *Service Storage* principle, is so clear-cut that it warrants summary reversal by this Court.[23] Further articulation of the case (through brief-

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instance in which a State court action proceeds in an area of Federal jurisdiction. By contrast, if the lower courts were instructed to enforce the *Service Storage* principle using their own injunctive power, there should be no need for this Court's attention to individual cases.

[21] Despite the general policy, this Court has granted interlocutory certiorari to review a preliminary injunction. *Myers v. Bethlehem Corp.*, 303 U.S. 41 (1938) (finding that a preliminary injunction was improperly issued because of a lack of jurisdiction).

[22] Enforcing *Service Storage* would secure uniformity of decisions by avoiding conflicts between State and Federal authorities. 359 U.S. at 177-78.

[23] The requirements for a preliminary injunction have clearly been met. The ICC should prevail, on the basis of *Service Storage,* on its claim that the State enforcement action cannot proceed in the face of the ICC determination that the operations are Federally authorized. As described above, there is a threat of irreparable injury to the Federal system absent an injunction (see pp. 6-8, *supra*). That threat outweighs any harm to Texas, which has other avenues of relief (see n.7, *supra*). Finally, the injunction would serve the public interest in a sound Federal regulatory system (see pp. 6-7, *supra*). See *University of Texas v. Camenisch,* 451 U.S. 390, 392

ing and oral argument) should not be necessary; the issue involved is a purely legal one that is controlled by direct and unambiguous precedent of this Court. Moreover, summary reversal is necessary to minimize the harm to the Federal program described above (at pp. 6-8,) particularly in view of the State court injunction prohibiting a Federally-licensed operation.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the decision of the court below denying the motion for preliminary injunction should be summarily reversed.

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MAY 1988

(1981) (acknowledging the Fifth Circuit test for the issuance of a preliminary injunction).

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-4725

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA, AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

Feb. 1, 1988

Before POLITZ, JOHNSON and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The Interstate Commerce Commission seeks a preliminary injunction to stay certain proceedings in a Texas state court. According to the Commission, the state proceeding concerns claims identical to those pending before this court in an appeal from a declaratory ruling made by the Commission. Convinced that the state court proceeding poses no serious threat to our jurisdiction to hear the administrative appeal, we deny the motion.

I.

The State of Texas has appealed directly from an order of the ICC determining that certain truck shipments made by Reeves Transportation Company

within Texas are interstate – rather than intrastate – in nature. The consequence of this ruling is that the shipments, which Reeves made under an ICC certificate, are not subject to the rules of the Texas Railroad Commission. The main basis for the state's appeal is that the ICC lacked jurisdiction to issue a declaratory ruling as to the interstate status of a shipper. The controversy revolves around the proper interpretation of *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 79 S.Ct. 714, 3 L.Ed.2d 717 (1959).[1]

Reeves transported carpet made by Armstrong Mills from Arlington, Texas, to other points within the state, but did not obtain authorization from the state commission. The state considered the shipments intrastate, and began an investigation of Reeves in 1985. Because the shipments involved goods originating in Georgia, Reeves and Armstrong petitioned the ICC for a declaratory ruling that the shipments were interstate and beyond the state's regulatory authority. While the ICC proceedings were pending, the Attorney General of Texas filed an enforcement action against Reeves in Texas state court, styled *State of Texas v. E & B Carpet Mills, a division of Armstrong World Indus., and Reeves Transp. Co.*, No. 386,524, 353d Texas Judicial District. The state also intervened in the ICC proceedings, but the Commission denied Texas' motion to stay the administrative proceeding pending the outcome of the state court suit.

In 1986, after notice and hearing, the ICC ruled that the shipments were interstate and thus within the ICC's exclusive regulatory authority. On this basis, Armstrong filed a complaint in federal district court seeking

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[1] Obviously, we intimate no opinion as to merits of the administrative appeal or the state's likelihood of success.

to enjoin the state court action. *E & B Carpet Mills v. Mattox,* Civ. No. A-86-446 (W.D.Texas). As an intervening plaintiff, the ICC supported Armstrong's motion for a preliminary injunction. In October, 1986, the district court denied the injunction, finding that Armstrong had failed to prove irreparable injury because any damages sustained by Armstrong could be compensated by law. Neither Armstrong nor the ICC appealed the decision though entitled to by 28 U.S.C. § 1292(a)(1). In October, 1987, the ICC filed its own motion for a preliminary injunction asserting irreparable injury to the federal government. The district court has not ruled on the Commission's request.

Meanwhile, the ICC denied petitions to reconsider its declaratory order. The State of Texas filed this direct appeal from the administrative decision. The ICC now asks the court to enjoin the state court proceeding pending our review of the ICC's order.

II.

[1, 2] The All Writs Act, 28 U.S.C. § 1651,[2] gives this court limited authority "to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." *FTC v. Dean Foods Co.,* 384 U.S. 597, 604, 86 S.Ct. 1738, 1742, 16 L.Ed.2d 802 (1966). Moreover, because a federal agency seeks the injunction, the ICC's motion is not directly precluded by the strictly enforced rule of the Anti-Injunction Act, 28 U.S.C. § 2283.[3] *See Leiter Minerals, Inc. v. United*

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[2] "[A]ll courts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[3] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

States, 352 U.S. 220, 225-226, 77 S.Ct. 287, 290-91, 1 L.Ed.2d 267 (1957); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971); *Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387, 394 (5th Cir.1969), *cert. denied*, 397 U.S. 910, 90 S.Ct. 907, 25 L.Ed.2d 90 (1970). Nevertheless, we are guided by the overarching principle that federal courts are to be cautious about infringing on the legitimate exercise of state judicial power. *See generally Younger v. Harris*, 401 U.S. 37, 44-45, 91 S.Ct. 746, 750-51, 27 L.Ed.2d 669 (1971).

[3] It is difficult to see why an injunction is necessary to preserve our jurisdiction over the case. The state enforcement proceeding arguably involves application of the ICC's declaratory order; no doubt the order constitutes Armstrong's primary defense. But the state court does not have the power to review the ICC's order for error and the state court's interpretation obviously has no binding effect on our decision in that regard. If we had already reviewed and affirmed the ICC order, *after* which the state brought an enforcement proceeding, this court would not be compelled to enjoin the proceeding. Rather, as was the case in *Service Storage*, the state court's application of the ICC's order may be reviewed in due course by the U.S. Supreme Court.

[4] In fact, as this hypothetical demonstrates, the ICC seeks this injunction because it believes the enforcement proceeding interferes with its own jurisdiction, not ours. In other words, the ICC contends that once it has entered a declaratory order, no proceeding in which the order might constitute a defense may be brought in any state court. While such a rule might

better effectuate the ICC's decisions, it has little to do with our power to review the Commission's work.[4]

Although somewhat similar to this case, *Tampa Phosphate, supra,* does not control our decision. There a railroad brought condemnation suits to establish a right-of-way for a new line, even though the ICC had ruled both that the proposed line would be subject to federal regulation as interstate commerce and that no ICC certificate would be issued. A federal district court preliminarily enjoined the state-court condemnation suits, and we affirmed. However, unlike this case, the *Tampa Phosphate* court relied on a jurisdictional statute expressly authorizing injunctions against construction of an unauthorized railroad line. *See* 418 F.2d at 393. Here the ICC points to no authority indicating that Congress has tipped the balance in favor of federal interests. Unlike *Tampa Phosphate,* then, we have no authority to

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[4] In this regard we also note that second of the three exceptions in the Anti-Injunction Act contains the same language as the All Writs Act, insofar as it permits a federal court to issue an injunction "where necessary in aid of its jurisdiction." In cases decided under this exception, courts have interpreted the language narrowly, finding a threat to the court's jurisdiction only where a state proceeding threatens to dispose of property that forms the basis for federal in rem jurisdiction, *see, e.g., Signal Properties, Inc. v. Farha,* 482 F.2d 1136, 1140 (5th Cir.1973), or where the state proceeding threatens the continuing superintendence by a federal court, such as in a school desegregation case. *See* Wright & Miller § 4225. In no event may the "aid of jurisdiction" exception be invoked merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court's decision. *See Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295-96, 90 S.Ct. 1739, 1747-48, 26 L.Ed.2d 234 (1970).

issue an injunction beyond that necessary to protect our own jurisdiction. Because our jurisdiction is not threatened here, the Interstate Commerce Commission's motion for a preliminary injunction is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4725

STATE OF TEXAS, PETITIONER

versus

UNITED STATES OF AMERICA, AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

PETITION FOR REVIEW OF AN ORDER OF THE
INTERSTATE COMMERCE COMMISSION
(Texas Case)

[Filed Mar. 8, 1988]

Before POLITZ, JOHNSON and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that respondents' motion for reconsideration of the Court's order of February 1, 1988, is DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

February 17, 1988

Mr. Michael L. Martin, Attorney
Interstate Commerce Commission
12th & Constitution Ave., NW, Rm. 5211
Washington, DC 20423

No. 87-4725 – State of Texas vs. USA & ICC

Dear Counsel:

Please be advised that your petition for rehearing of the Court's order of February 1, 1988, was received, filed and distributed to the panel for disposition.

We have been authorized to return herewith, unfiled, the suggestion for rehearing en banc of that order with the advice that the Court will not consider petitions for rehearing en banc of non-dispositive orders.

We will notify you immediately upon release of the Court's decision on the petition for panel rehearing.

Very truly yours,

Gilbert F. Ganuchaeu, Clerk

/s/ RICHARD E. WINDHORST, JR.
Richard E. Windhorst, Jr.
Chief Deputy Clerk

REW/ja

cc: All Counsel of Record

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, United States Constitution, provides that:

Section 8. [1] The Congress shall have Power To

* * *

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

Article VI, United States Constitution, provides that:

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

The All Writs Act, Title 28, United States Code, Section 1651, provides that:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

* * *

The Administrative Orders Review Act, Title 28 United States Code, Section 2342, provides that:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of–
>
> * * *
>
> (5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of title 49, United States Code.

The Administrative Orders Review Act, Title 28 United States Code, Section 2349, provides that:

> (a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review.
>
> * * *

The Interstate Commerce Act, Title 49 United States Code, Section 10521, provides that:

> (a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation . . . to the extent that passengers, property, or both, are transported by motor carrier–
>
> (1) between a place in–
>
> (A) a State and a place in another State;
>
> * * *
>
> (b) This subtitle does not–

> (1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier . . .

The Interstate Commerce Act, Title 49 United States Code, Section 10921, provides that:

> Except as provided in this subchapter or another law, a person may provide transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter II, III, or IV of chapter 105 of this title or be a broker for transportation subject to the jurisdiction of the Commission under subchapter II of that chapter, only if the person holds the appropriate certificate, permit, or license issued under this subchapter authorizing the transportation or service.

APPENDIX E

No. MC-C-10963

ARMSTRONG WORLD INDUSTRIES, INC. – TRANSPORTATION WITHIN TEXAS – PETITION FOR DECLARATORY ORDER

Decided April 3, 1986

DECISION

BY THE COMMISSION:

Armstrong World Industries, Inc. (Armstrong or petitioner) filed a petition for a declaratory order to determine whether certain transportation within Texas is interstate or intrastate in nature. Reeves Transportation Company of Georgia (Reeves) joined in the request. By a decision served July 10, 1985, we granted the petition and instituted this proceeding. Notice of the proceeding was published in the Federal Register [50 F.R. 28296 (July 11, 1985)]. The notice invited comments from interested parties, and 15 parties submitted written comments.[1] In addition, Armstrong and Reeves submitted replies to the comments. We conclude that the involved movements are performed in interstate commerce.

[1] Armstrong, Reeves, the State of Texas, the Railroad Commission of Texas, the Alabama Public Service Commission, the Texas Industrial Traffic League Division, Red Arrow Freight Lines, Inc., William J. Monheim, Walton Transportation Company, Overnite Transportation Company, Burnham Service Company, Inc., Central Freight Lines Inc., Cantrell Motor Lines Inc., Consolidated Motor Express, Inc., and Hartley Trucking Company, Inc.

PRELIMINARY MATTERS

Red Arrow Freight Lines, Inc., and Central Freight Lines Inc. request that this proceeding be set for oral hearing. The requests will be denied. The written record is complete and fully explores all the issues. It contains all the facts necessary to reach an informed decision, and material facts are not disputed.

The State of Texas (State) moves that this proceeding be stayed pending the outcome of a suit brought in a Texas State court by the State on this very same issue. The case is docketed as *State of Texas* v. *E & B Carpet Mills, a Division of Armstrong World Industries, Inc., and Reeves Transportation Company of Georgia,* No. 386524 (Travis County Texas Dist. Ct., filed October 3, 1985).[2] The State argues that the facts before us are not clear and uncontroverted, as alleged by petitioner, and that the State court is uniquely qualified to develop the record. The State requests a stay in the interest of comity, to avoid possible conflicting decisions in an area of State regulation, and in the interest of judicial economy. Petitioner and Reeves have replied in opposition to this motion.

The State's motion for a stay will be denied. The threshold question here and in the State proceeding is whether the transportation at issue is being lawfully performed under Reeves' interstate operating rights. The Supreme Court has twice held that the interpretation of this Commission's certificates is a matter for this agency in the first instance. *Service Storage & Transfer Co.* v. *Virginia,* 359 U.S. 171 (1959); *Jones Motor Co.,*

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[2] The State seeks over $22,000 in fines plus attorneys' fees, court costs, and investigation costs from E&B and Reeves. It also seeks to enjoin Reeves from transporting the involved traffic until it obtains Texas intrastate operating authority.

Inc. v. *Pennsylvania Public Utility Comm'n*, 361 U.S. 11 (1959). Other Federal courts have since held the same.[3] Moreover, as noted above, we find the record in this proceeding is complete and ripe for decision.

The Railroad Commission of Texas (Railroad Commission) requests leave to file "rebuttal comments" to the comments of Armstrong and Reeves. It states that its initially filed comments were based on the limited facts provided by the Federal Register notice. We will accept these additional pleadings and consider them. While the notice specifically referred interested persons to our full decision for additional details, the subsequent comments of Armstrong and Reeves did significantly expand on the incidents of the transportation at issue. The Railroad Commission has a significant interest in the outcome of this proceeding, and it should be given the opportunity to state fully its position.

ISSUE

All parties agree that the issue presented here is whether the movements of non-sidemarked[4] carpet from Arlington to other Texas points are interstate or intrastate in nature. The case law is clear, and the parties concede, that movement beyond Arlington of *sidemarked* carpet is in interstate commerce. See, *e.g.*, *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567-68

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[3] *See, e.g., George Transfer & Rigging Co., Inc.* v. *United States*, 380 F. Supp. 179 (D.Md. 1974) (3-judge court), affirmed *mem.* 419 U.S. 1042 (1974); *Contractors Cargo Co.* v. *United States*, 229 F. Supp. 287 (C.D.Cal. 1969) (3-judge court), affirmed *mem.* 397 U.S. 39 (1970). *Merchants Fast Motor Lines, Inc.* v. *ICC*, 528 F.2d 1042 (5th Cir. 1976).

[4] Sidemarking designates the customer to whom the carpet will eventually be shipped and is indicated on the roll of carpet by a tag and also on the freight documents.

(1943); and *Country Maid, Inc.* v. *Haseotes,* 324 F.Supp. 875, 877 (E.D.Pa. 1971) ("When goods are sent to a storage point to fill the special order of a customer, they remain in the flow of commerce until they reach that customer.")

BACKGROUND

E&B Carpet Mills (E&B), a division of Armstrong World Industries, manufactures carpet at Dalton, GA, and Winchester, TN. It transports the Winchester carpet to Dalton for storage and future distribution. E&B also operates a service center at Arlington, TX. It ships carpet from Dalton to Arlington, temporarily stores it there, and then reships it to retail outlet customers located primarily in Texas. Less than 10 percent of this carpet moves from Arlington to points in neighboring States. In 1984, E&B had gross sales of $135 million. Approximately three percent of these sales involved carpet shipped from Dalton to Arlington, followed by movement to other Texas points.

E&B established its Arlington service center in 1969 to have E&B personnel nearby to provide a faster and more flexible service to Texas customers, and to enable it to take advantage of lower truckload rates from Dalton to Arlington in lieu of higher less-than-truckload rates from Dalton directly to individual Texas customers. In 1984, approximately 850,000 square yards of carpet moved through the service center. On average, the service center has in stock about a 2-month inventory.

Generally, almost all carpet at the service center is stored without segregation, except that carpet that has already been designated for a particular customer is stored separately. About 40 percent of the carpet

handled at the center is cut, at customer request, prior to delivery. The rest is reshipped in exactly the same form in which it arrives.

Approximately 31 percent of the carpet coming into Arlington is designated for a particular customer. E&B sidemarks these rolls upon leaving Dalton. Sidemarked shipments generally leave Arlington within 48 hours. The remaining 69 percent of the carpet shipped from Dalton remains at Arlington an average of 2 to 3 months. This carpet, delivered to Arlington without an underlying customer order, generally moves from Dalton on the basis of sales trends and the buying history of E&B's major customers, which account for about 80 percent of its overall sales.

The Arlington service center currently handles about 35 percent of the carpet that E&B sells to customers in Texas, and formerly handled about twice this amount. Because of this decline in volume, Armstrong has sought to improve the center's business. Under E&B's prepaid freight program instituted in June 1984, E&B pays the freight charges on customer purchases moving through the service center rather than shipping the freight collect. This allows E&B to quote delivered prices to its customers, who then know as soon as possible the amount owed and only have to make one payment for the shipment.

The prepaid freight program used Reeves' services because E&B found that local intrastate rates were very high and that Reeves offered interstate rates that were much more competitive. According to one study made by E&B, Reeves' rates were, on average, 38 percent lower than the otherwise applicable intrastate rates.

Reeves holds nationwide general commodity authority and specializes in serving the carpet industry. Reeves

does not hold any Texas intrastate operating authority, although it has recently applied for such authority in the event that the movements at issue are found to be intrastate in nature. E&B's shipments through the service center to Texas customers move under a storage-in-transit provision contained in Reeves' tariff ICC REEV 225, at Item 910. This item allows shipments from Dalton to stop in transit for storage, the effect of which is to treat the inbound carpet shipments from Dalton to Arlington and the out-bound shipments from Arlington to other Texas points as one continuous interstate movement.

To take advantage of this provision, E&B must, at the time of the initial shipment from Dalton, note on the bill of lading and shipping order that the shipment is to be stored in transit. E&B's personnel at Dalton have been instructed to designate all shipments to Arlington for storage-in-transit. Reeves' transit item further requires that the subsequent bill of lading and shipping order for outbound shipments from the service center contain a reference to the freight bill number, bill of lading number, or the manifest number from the original inbound movement. These requirements ensure that each shipment from the service center has had a prior interstate movement. The storage-in-transit provision further requires reshipment from the storage point within 12 months of the carpet's being placed in storage. Reeves uses this storage-in-transit provision in conjunction with aggregate tender and volume discount provisions it maintains in other tariffs.

E&B frequently uses one carrier to transport the carpet from Dalton to Arlington, and then Reeves to deliver it from the service center to the ultimate destination. Sometimes, Reeves performs both movements. Armstrong states that, while Reeves has been

very active in moving E&B's carpet from Arlington to other Texas points, it does not have the capacity to handle it all. The majority of this traffic still moves by other carriers under intrastate rates. For example, between May and July 1985, Reeves hauled approximately 14 percent of E&B's traffic moving from Arlington to other Texas points (except points in the Dallas-Ft. Worth commercial zone).[5] E&B states that it has been unable to find other interstate carriers willing to offer a service similar to that of Reeves that makes use of lower, interstate rates.

COMMENTS

Armstrong states that its fixed and persisting intent is that all shipments moving through the Arlington service center are in interstate commerce. From the moment the carpet leaves Dalton for Arlington, there is no doubt that its ultimate destination will be either a customer in Texas or in a neighboring State. E&B manufactures many different grades and qualities of carpet that are not interchangeable. Armstrong argues that the non-fungibility of this carpet, and E&B's ability to locate and describe any given roll of carpet at the service center, support its position that the service center is merely an extension of E&B's interstate commercial activities established for the convenience of its Texas customers.

Armstrong states that the reason it has been unable to expand its prepaid freight program beyond Reeves is

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[5] Traffic in the Dallas-Ft. Worth commercial zone is handled by local carriers. It is E&B's position that, this traffic too moves in interstate commerce, but that it is exempt from the Commission's economic regulation under 49 U.S.C. 10526(b) because Arlington lies within the Dallas-Ft. Worth commercial zone.

the regulatory policy of the Railroad Commission. Armstrong claims that, for years, the Railroad Commission has vigorously monitored transportation activities within Texas, and through innumerable enforcement proceedings, levying of fines, and a constant program of investigating carriers' records, the Railroad Commission has created an intimidating climate in the Texas transportation industry. As a result, Armstrong states that most carriers are unwilling to consider the merits of its position that its shipments from Arlington are part of a continuing interstate movement. Petitioner claims that the Railroad Commission's regulatory policies deter interstate carriers from implementing innovative transportation services that might compete with Texas intrastate carriers. Intrastate carriers have been protected from competition, and have been able to maintain artificially high rates. These extra costs, Armstrong points out, are ultimately borne by the consumer.

Armstrong states that continued operations at the service center are contingent upon its obtaining a favorable decision in this proceeding. Otherwise, E&B will be forced to open a service center in Arkansas or Oklahoma to serve its Texas customers. Besides the fact that the resultant service would not be nearly as responsive or competitive, Armstrong finds it ludicrous that it should be forced to serve Texas customers from outside the State to avoid oppressive intrastate regulation. This whole matter, Armstrong believes, constitutes an undue burden on interstate commerce.

Finally, Armstrong proposes that, in addition to resolving the instant controversy, we adopt a "safe harbor" test to end the confusion in this area. Armstrong argues that the existing boundary between interstate and intrastate commerce is too vague to be applied confidently by shippers and carriers to the myriad shipping

situations that arise daily. In addition, misapplication of the existing guidelines often results in unnecessary litigation costs and fines. To end this uncertainty and expense, Armstrong proposes the following test to redefine and clarify the boundary between interstate and intrastate shipments of non-fungible commodities moving between points in the same State following a movement from outside the State:

> A movement within a State of identifiable, non-fungible goods which were delivered in the State from a point in another State or in a foreign country within the preceding 365 days, and which have been stored in the State, shall be considered a movement in interstate or foreign commerce so long as there has not been a substantial change in the character, value and utility of the goods while in the State.

The elements of this test allegedly are derived from cited case law.

The Texas Industrial Traffic League Division, Walton Transportation Company, Burnham Service Company, Inc., Cantrell Motor Lines, Inc., Consolidated Motor Express, Inc., and Hartley Trucking Company, Inc., support Armstrong's position.

Reeves' position is that the involved movements are interstate in character, and that it performs them for E&B pursuant to a lawful transit tariff provision on file with this Commission. It notes that it has similar arrangements with other shippers, but that some have discontinued these arrangements out of fear of being held liable for unlawful intrastate transportation.

The Railroad Commission argues that the critical factor in issues of this sort is whether the ultimate destination of the shipment is known at the time the shipment

leaves the origin point. If the ultimate destination is not known at this time, then once the shipment comes to rest at a storage, gathering, or processing point it ceases to be in interstate commerce. Any subsequent movement of this shipment from this point to a point in the same State is then intrastate in nature, and any person transporting it needs authority from the State. For these reasons, the Railroad Commission concludes that the movements at issue are intrastate in nature and, therefore, regulated by the State. The Alabama Public Service Commission echoes the position of the Railroad Commission. It adds that a shipper's intention that the transportation be interstate in nature is wholly irrelevant because the shipper's intention will usually be to obtain the lower freight rate.

Red Arrow, a carrier whose Texas intrastate revenues account for approximately 75 percent of its total revenues, expresses similar views to the effect that the continuity of transportation from Dalton is broken at Arlington if the ultimate destination of the shipment is not known at the time the shipment leaves Dalton. The State and Central Freight Lines Inc. also support this position. William J. Monheim, a registered practitioner, asserts that the subject traffic is intrastate in nature. Overnite Transportation Company believes that additional information is necessary to make a determination.

DISCUSSION AND CONCLUSIONS

An analysis of the facts presented, and relevant case law, leads us to conclude that the movements by Reeves of non-sidemarked carpet between Arlington and other Texas points are interstate in nature.

It is well settled that characterization of transportation between two points in a State as interstate or intra-

state in nature depends on the "essential character" of the shipment. *Texas & N.O.R.R.* v. *Sabine Tram Co.*, 227 U.S. 111, 122 (1913). Crucial to a determination of the essential character of a shipment is the shipper's fixed and persisting intent at the time of shipment. *Baltimore & O.S.W.R.R. Co.* v. *Settle*, 260 U.S. 166 (1922). This intent is ascertained from all the facts and circumstances surrounding the transportation. For example, the presence of common incidents of through carriage such as through billing, uninterrupted movement, continuous possession by the carrier, or unbroken bulk may indicate a through interstate movemement. However, the presence of these elements is not a prerequisite to a finding of such a movement. The existence of a transit privilege under which the traffic moves, though not dispositive of the issue, is a strong indication of the through character of a movement, and it diminishes the significance of the above factors. As the Court noted in *Settle*:

> These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet the through interstate tariffs apply. [citation omitted] 260 U.S. at 171.

As particularly pertinent here, the Court also observed that shipments from a distribution point following an in-

terstate movement are often deemed a separate intrastate movement if the applicable tariffs do not confer reconsignment or transit privileges. 260 U.S. at 173.

Parties that support a finding that the subject transportation is intrastate in nature ignore the significance of the transit arrangement in determining the character of commerce within a single State. Consequently, their reliance on *Atlantic Coast Line R.R. Co.* v. *Standard Oil of Kentucky*, 275 U.S. 257 (1927), and its progeny is misplaced because no transit arrangements were involved. The Commission and the courts have made this distinction clear. For example, in *Surles Contract Carrier Application*, 4 M.C.C. 488 (1938), the Commission found that motor carrier movements wholly within Texas from a shipper's warehouse to the shipper's retail stores were not subject to the Commission's jurisdiction notwithstanding that prior to storage the freight had moved from out-of-State points in regulated carriage. The Commission concluded that the mere intent to distribute merchandise at some future time does not establish the essential continuity of movement between the original shipment from out of State and the instate distribution from the warehouse. However, the Commission was very specific in pointing out that, unlike the siutation here, "[t]here were and are no joint rates, no provisions for storage in transit, or any other arrangements between the carriers for a continuous shipment from origin points to any place beyond the point of [initial] delivery. * * * " 4 M.C.C. at 494.

Lending further support to our conclusion that the involved Texas movements are interstate in nature is *Commercial Oil Transport Extension–Jacksonville, Ill.*, 73 M.C.C. 527 (1957). That case involved movements to and from a shipper's plants in Illinois under various transit arrangements. One movement was iden-

tical to that involved here, *i.e.*, traffic moved from oiut of State to the shipper's plants in Illinois, where, after processing, the commodities moved to other points in Illinois. The Commission concluded that the latter movements were in interstate commerce. The existence of appropriate transit arrangements was deemed sufficient to convert these otherwise separate movements into a through interstate movement. 71 M.C.C. at 532. The same conclusion under similar circumstances was reached in *Commercial Oil Transport Extension–Oils,* 76 M.C.C. 773, 777 (1958).

It has long been recognized that regulated carriers may provide storage of shipments in connection with their transportation service. Furthermore, a transit privilege afforded by an appropriate tariff provision may have the effect of converting what otherwise would be an intrastate movement into interstate transportation by tying together separate transportation services into a single, through interstate movement. *Oilfield Equipment To and Between the Southwest,* 300 I.C.C. 409, 428 (1957). Though some transit arrangements are not free from doubt on the question of continuity of movement, the Commission noted in *Oilfield Equipment, supra,* the tendency is to broaden rather than to narrow the scope of transportation in interstate commerce. These decisions by no means exhaust the subject, but simply serve to illustrate the importance of transit arrangements in determining the essential character of the commerce.

A case bearing directly on the non-sidemarked nature of the carpet at issue is *Railroad Comm. of Texas* v. *Oil Field Haulers Assn.,* 325 I.C.C. 697 (1965). In it, the Commission examined whether pipe, transported from out-of-State origins to motor carrier storage-in-transit yards in Texas, was in interstate commerce when such

pipe was subsequently moved from the storage yards to an ultimate destination also in Texas. At the time the pipe was placed in storage, the ultimate consignee and destination were unknown. The transportation and storage were performed pursuant to storage-in-transit tariff provisions maintained by the carriers. The storage yards were maintained by the carriers and shipments therefrom were transported to ultimate destinations upon instruction from the shipper or consignee.

Concluding that the movements of pipe from the storage yards to other Texas destinations were in interstate commerce, the Commission found critical the fact that:

> * * * this pipe is transported by defendants pursuant to the terms of the storage-in-transit arrangement provided in the tariff duly filed with this Commission. * * *
>
> The record clearly indicates that all the pipe does in fact move beyond the transit point, and that it is in the intent of the shipper that the movement from origin to ultimate destination constitutes one continuous movement. *Merely because the exact identity of a particular consumer is unknown is of no moment.* As has often been stated, transit rests upon a fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination. [Emphasis added.] 325 I.C.C. at 701.

A similar conclusion was reached in *Oil County Iron or Steel, Pipe, Midwest to Okla. & Tex.*, 326 I.C.C. 511 (1966). See also *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 526 (1911); *Sabine Tram Co., supra* at

118, 130; *State Corporation Commission* v. *Bartlett & Co., Grain,* 338 F. 2d 495, 497-98 (10th Cir. 1964), *cert. denied,* 380 U.S. 964 (1965). Contrary to the contention of some parties, then, subsequent movements of shipments that are not sidemarked at the time of initial movement are not *ipso facto* intrastate in nature.

The reasoning and conclusion of the *Oil Field Haulers* case are equally compelling here. The only apparent distinction between the transit arrangements in that proceeding and those here is that there the storage yards were maintained by the carriers, whereas here the storage facility is maintained by the shipper. This distinction, however, is not of controlling significance. The critical element is the shipper's intent at the time the goods are initially shipped, as strongly evidenced by use of the transit privilege. The ownership or control of the in-transit storage facility, with one exception to be discussed *infra,* has no bearing on the shipper's intent at the origin point. Indeed, in the *Oil Field Haulers* case, even though the carriers maintained the storage yards, the goods were not released for transportation until the shipper issued instructions for delivery. 325 I.C.C. at 700. In short, no matter who controls the storage facility, the shipper controls final delivery.

Nonetheless, one court has attached some significance to the ownership of the storage facility, although in a different context, and some of the parties here rely on that case to oppose Armstrong's position. In *Southern Pac. Transp. Co.* v. *I.C.C.,* 565 F. 2d 615 (9th Cir. 1977), the court set aside a Commission decision that found certain trucking operations performed within California to be interstate in nature and performed without appropriate interstate authority.[6] At

[6] *Southern Pac. Transp. Co.–Invest. of Operations,* 120 M.C.C. 236 (1974).

issue were movements from a shipper's plants to its warehouse in the same State. The goods subsequently moved from the warehouse to intrastate, interstate, or foreign destinations, but the ultimate destinations were not determined until the goods had come to rest in the warehouse. The Commission held that the movements from the plants to the warehouse, although wholly within California, were in interstate commerce. The existence of storage-in-transit privileges was found to provide a "strong indication" of an intent of continuous interstate transportation from the plant origins to ultimate interstate destinations. 120 M.C.C. at 246-47.

The court disagreed, finding that the shipper's intent as to final destination could not be formed until the goods had come to rest in the warehouse:

> Inasmuch as the goods remained under [the shipper's] control at the Stockton warehouse and were not committed to a common carrier for an interstate or foreign movement until they left that warehouse, the requisite intent which governs the character of movement was not formed until shipment from Stockton. 565 F. 2d at 618.

The court rejected the contention that transit privileges transformed the initial intrastate movement into an interstate movement. 565 F. 2d at 619-20. The existence of two critical circumstances precluded such a result. First, when the goods left the plants, they were not committed to an interstate movement but only committed to a warehouse in the same State. Second, following the movement between two points in the same State, the goods were still in the shipper's control at the warehouse.

The court acknowledged the effect of transit arrangements in the characterization of commerce, as enunci-

ated by the Commission in *Oil Field Haulers, supra.* However, it distinguished that case on the ground that the carriers maintained the storage yards whereas the shipper controlled the warehouse in the case before it. 565 F. 2d at 619. In drawing this distinction, the court pointed to the Commission's language at 325 I.C.C. 705-06 that emphasized the difference between transit arrangements at public or shipper warehouses and storage-in-transit that remains completely in the carrier's control at its own facility. However, what the court did not note was that the Commission emphasized this difference in the context of the lawfulness of a substitution provision of a storage-in-transit arrangement where there existed the potential to commingle intrastate with interstate freight. The concern then was that, if the shipper maintained control over the storage, it could under a substitution rule mix local freight (*i.e.*, freight from an origin to a destination in one State) with other freight moving to or from out-of-State points.

This concern does not exist here, so there is no need to place dispositive emphasis on the ownership of the storage facility. None of the carpet transported to the Arlington service center has a Texas origin. Consequently, there exists no opportunity to commingle local and interstate freight. Each and every shipment from Arlington has had a prior out-of-State movement, and under the terms of the applicable tariff it must be matched with its counterpart by bill number. This distinction is sufficient to make the *Southern Pacific* case non-controlling here.

Moreover, the court's reasoning and conclusions regarding the effect of transit arrangements must be kept in the factual perspective of that case. The court refused to use the fiction of a transit privilege to impute an interstate intent to the shipper in order to establish

unlawful interstate transportation. It held only that transit privileges would not transform an initial intrastate movement into an interstate movement where the shipper's intent was not formed until after the initial movement. 565 F.2d at 619-20. In this respect, the court's analysis was governed by its perception that injustice would be worked upon the carrier by the Commission's "retroactive imposition of its jurisdiction." 565 F. 2d at 620. In short, the court refused to permit such a result where the carrier was unable to determine whether the prior movements were interstate or intrastate in nature until after the subsequent shipments were committed to an ultimate destination. This is not the case here.

In a later decision, the Ninth Circuit confirmed that *Southern Pacific* rested upon the indeterminate intent of the shipper at the time of the initial (intrastate) segment of what was in most – but not all – instances likely to be an interstate shipment. *Burlington Northern Inc.* v. *Weyerhauser Co.*, 719 F. 2d 304, 308-09 (9th Cir. 1983). (A mere "expectation" that most of the goods would eventually move interstate was not sufficient to constitute a "fixed and persisting intent" in *Southern Pacific.* 565 F. 2d at 618.) This reading of *Southern Pacific* has been confirmed by still another court, which observed that the transit privileges in *Southern Pacific* were merely "insufficient" to overcome the lack of evidence of the requisite intent on the part of the shipper. *Northwest Terminal Elevator Ass'n* v. *Minnesota PUC,* 576 F. Supp. 22, 30 (D. Minn. 1983). Hence, *Southern Pacific* cannot control here where the shipper (Armstrong) intends to and does in fact ship all of the carpet interstate from Georgia into Texas. Instead, the requisite intent required under *Settle* and *Sabine Tram, supra,* is evident, See, *e.g., State of Texas* v. *Anderson*

Clayton & Co., 92 F. 2d 104 (5th Cir. 1937), *cert. denied*, 302 U.S. 747 (1937); *Rush-Common Carrier Application*, 17 M.C.C. 661, 677-78 (1939); *Agricultural Services Ass'n–Investigation*, 131 M.C.C. 1, 13 (1978); *Exception to Interstate Application of Rates on Logs*, 364 I.C.C. 68, 70 (1980).

In sum, then, we find the transportation of non-sidemarked carpet by Reeves within Texas under its transit-in-storage provision part of a continuous interstate movement. E&B's intent that the carpet move to interstate destinations is clearly formed at the time the carpet leaves Dalton. It is unimportant that the ultimate destination and consignee of each particular shipment is not known at that time. It is the transit arrangement under which the carpet moves that joins the two movements as one, not the identity of the consignee. Nor does it matter that separate bills of lading are issued for the prior and subsequent movements of the carpet, or that the carpet comes back into the shipper's possession at Arlington. Nor does cutting the carpet at the service center alter the character of the commerce. The carpet moving from the service center is the identical carpet moving to it from out-of-State. At no time has it been processed or commingled in any way to cause it to lose the identity it had when it left Dalton. As the Supreme Court stated in *Settle, supra*, "neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is an essential of a through interstate shipment." 260 U.S. at 171. Accordingly, we conclude that the incidents surrounding the involved transportation clearly establish that the movements of non-sidemarked carpet within Texas by Reeves are part of continuous interstate movements, lawfully performed under a storage-in-transit provision contained in an appropriate tariff.

Finally, we decline to adopt the "safe harbor" test proposed by Armstrong for making future determinations. It is generally within our discretion whether to proceed via individual adjudication or to adopt general rules. *SEC* v. *Chenery*, 332 U.S. 194, 203 (1947); *National Small Shipments Traffic Conference* v. *ICC*, 725 F. 2d 1442, 1447 (D.C.Cir. 1984). Here we believe it more desirable to examine the particular circumstances presented in individual factual settings through adjudication, as in the past, than to attempt to formulate an all-encompassing rule. Moreover, few controversies like this have been brought before the Commission in recent years. Additionally, our resolution of the instant case not only ends the controversy among the three principles involved here, Armstrong, Reeves, and the State, but it also should serve as a guide to other persons in similar situations.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The requests for oral hearing are denied.
2. The motion of the State of Texas to stay this proceeding is denied.
3. The Railroad Commission is granted leave to file additional comments, and the comments are accepted into the record.
4. This proceeding is discontinued.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley.

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-10963

ARMSTRONG WORLD INDUSTRIES, INC., – TRANSPORTATION WITHIN TEXAS – PETITION FOR DECLARATORY ORDER

Decided: August 14, 1987

Our earlier decision in this proceeding was served April 23, 1986. In that decision, we found that certain movements of carpet from Georgia to Texas were interstate in character. Central Freight Lines, Inc. (Central), Red Arrow Freight Lines, Inc. (Red Arrow), the Alabama Public Service Commission (Alabama), and the State of Texas (Texas) (collectively all referred to as petitioners), have filed petitions to reopen. Armstrong World Industries, Inc. (Armstrong) and Reeves Transportation Company of Georgia (Reeves) replied. In addition, the United States Department of Transportation (DOT) filed a reply to the petitions to reopen of Central and Red Arrow, and Southwire Company (Southwire) filed comments in support of our earlier decision. Petitioners subsequently filed a joint supplement to their petitions to reopen.

PROCEDURAL MATTERS

1. *Intervention.* Petitions to intervene were filed by the Regular Common Carrier Conference (RCCC), National Motor Freight Traffic Association (NMFTA), National Industrial Transportatioin League (NIT League), National-American Wholesale Grocers' Association, and jointly by National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, Inc. Each petition includes comments addressing the merits of our prior decision. Neither DOT nor Southwire moved to intervene, but we will consider such motions *sua sponte.*[1] Armstrong replied to the petitions filed by NIT League, RCCC, and NMFTA.

We will grant all motions to intervene. While intervention is discretionary, we see no prejudice resulting to any party from our decision to consider all views presented at this point in the proceeding. Armstrong urges us to deny the motions to intervene filed by RCCC and NMFTA on the ground that their only purpose is to seek standing to oppose our decision in court, but this argument is unconvincing. Because decisions involving the nature of interstate versus intrastate transportation can have a significant impact upon RCCC and NMFTA members, we believe we should take their views into account in our decision. Authorizing intervention by all parties seeking it will not broaden the issues.

2. *Late filings.* Nearly all of the above petitions and replies were late, and most did not include a motion for acceptance. However, we will accept all late pleadings. No prejudice will result from this action.

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[1] DOT filed comments prior to the service of our earlier decision, but because they were late, and we were unable to consider them then, DOT was not made a party of record.

3. *Motion to strike.* Armstrong moves to strike petitioners' supplemental petition to reopen filed on August 21, 1986. This petition contains new evidence obtained by deposition of certain individuals on August 11 and 12, 1986, in connection with a civil suit brought by Texas in a Texas State court concerning the same issue involved in this case.[2] Armstrong objects to its acceptance on the grounds that petitioner failed to serve it with a copy of the depositions attached to the petition (although it was served with a copy of the petition itself) and that this constitutes an improper *ex parte* communication. Armstrong further alleges there is no justification for petitioner's failure to tender this evidence earlier.

In reply, petitioners indicate that they have submitted this new evidence at the earliest possible opportunity. They state that Armstrong thwarted their attempts to depose the involved individuals from the outset of the litigation. Only after a second court order on August 8, 1986, compelling the testimony, did Armstrong comply. Further, petitioners state that Armstrong's counsel (who filed the instant motion to strike) was himself present at all the involved depositions, that the court reporter recording the depositions has confirmed that Armstrong's counsel was sent copies of the depositions at or about the same time as were petitioners, and that, in any event, petitioners subsequently forwarded to Armstrong's counsel an additional copy of the depositions.

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[2] *State of Texas* v. *E & B Carpet Mills, a Division of Armstrong World Industries, Inc., and Reeves Transportation Company of Georgia*, No. 386524 (Travis County Texas Dist. Ct., filed Oct. 3, 1985).

By pleading filed October 13, 1986, Armstrong moves for late acceptance of a tendered reply to the substance of petitioners' supplemental petition. Armstrong states that, after receiving copies of the depositions, its reply took a long time to fashion because petitioners' allegations did not contain specific references to the several hundred pages of accompanying depositions and exhibits. Armstrong states that it was a time-consuming task to identify the sources of petitioners' allegations, to have one deposed person correct or supplement the uncorrected transcript of his deposition, and then to reply to the allegations.

Armstrong's late reply will be accepted, and its motion to strike the supplemental petition denied. The record now contains a full and balanced discussion of the new evidence.

4. *Recusal.* Texas requests that the Commission recuse itself from all further actions in this proceeding because of institutional bias and direct pecuniary interest. Texas refers to a pending Federal lawsuit brought by Armstrong's subsidiary, E & B Carpet Mills (E & B), against the Attorney General of Texas and others after issuance of our prevous decision in this proceeding.[3] Texas notes that the lawsuit was filed on August 18, 1986, the same day that this Commission mailed a motion to intervene in the action. Texas argues that this apparent collaboration between the Commission and Armstrong demonstrates an institutional bias of this agency towards Texas. It also argues that the Commission now has a pecuniary interest in the outcome of this proceeding, due to its status as a party in the Federal lawsuit, that further prejudices the State of

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[3] *E & B Carpet Mills v. Jim Mattox*, No. A-86-CA-446 (W.D. Tex., filed Aug. 18, 1986).

Texas. Texas asks that we dismiss this proceeding on the grounds that the Texas State court is the proper forum in which to resolve the issue.

Armstrong replies that Texas' motion constitutes an improper *ex parte* communications. The pleading was served on all parties to the Federal lawsuit, but it was not served on all parties to this proceeding. Armstrong asks, therefore, that we disregard it. Texas replied to this reply. It states that Armstrong's apparent collaboration with this Commission concerning the Federal lawsuit itself constitutes an improper *ex parte* communication, and requests that a hearing be conducted on this matter before an impartial panel.

Texas also submitted two letters obtained under the Freedom of Information Act that it states represent *ex parte* communications. Both are dated in October 1985. One is from Armstrong's counsel to the Commission's General Counsel requesting Commission intervention in the State court action referred to in footnote 2, *supra*, and the other is a reply from the General Counsel to Armstrong's counsel declining intervention at that point but requesting to be kept informed of further developments. Texas argues that these letters show a pattern of ongoing *ex parte* communications between the Commission and Armstrong. Armstrong argues that none of the communications that Texas questions is a prohibited *ex parte* communication under our regulations at 49 CFR 1102.2. It claims that an *ex parte* communication is only prohibited between a party and a Commission employee who participates in the decision of a proceeding, and only if that communication involves the merits of the proceeding. Armstrong argues that contact did not go beyond the General Counsel's Office, that the General Counsel was not a decisionmaker in this proceeding, and that the communications did not in-

volve the merits of this case but only the subject of possible Commission intervention in litigation to assert and protect its jurisdiction over the subject matter.

Although Texas did not serve its recusal request on all parties of record, we will consider it because it was properly served on Armstrong who, from the outset, has been primarily responsible for prosecuting the petition for the declaratory order, and because Armstrong replied to it.

We will deny Texas' request because its allegations are baseless. This Commission has only one interest in the court proceeding in which it has intervened – to protect its primary jurisdiction to decide the issue before it in this proceeding. As we stated in our prior decision (slip op. at 2), the Supreme Court has twice held that the interpretation of this Commission's certificates is a matter for this agency in the first instance. We intend to execute this responsibility in a fair and impartial manner and we reject Texas' suggestions to the contrary. The Commission does not have a pecuniary interest in the outcome of this proceeding as Texas suggests; we have not endorsed Armstrong's claim for monetary damages in the Federal lawsuit, but have joined with Armstrong only in seeking injunctive relief.

Finally, the allegations of *ex parte* communications by both Armstrong and Texas also are baseless.[4] The communications involved are not the kind prohibited by our rules. They did not address the merits of the case and do not in any way compromise our impartiality.

5. *Motion to take official notice.* Armstrong filed a motion to take official notice of two Federal appellate court decisions that arguably are relevant to jurisdic-

[4] We note that Texas continues to press these allegations by filing repetitive pleadings in letter form with numerous extraneous attachments.

tional issues raised by Texas. Texas relied in opposition. The motion will be granted, although the cases are not directly on point. Texas will not be prejudiced, as it has addressed the merits of the two cases and their relevance.

DISCUSSION AND CONCLUSIONS

The petitions to reopen, including the supplemental petitions, will be denied. There is no showing that our prior action will be affected materially because of new evidence[5] or changed circumstances, or that it involves material error.

In their initial petitions to reopen, Central, Red Arrow, Alabama, and Texas each repeat arguments previously made and fully considered and discussed by us in our prior decision. RCCC and NMFTA support petitioners' position. The other intervenors support the position of Armstrong and Reeves. RCCC and NMFTA do not offer any new arguments of their own, but simply adopt by reference petitioners' arguments. For the most part, these arguments were earlier found to be without merit and require no further discussion here. We will, however, address an alleged inconsistency in our prior decision. We will then consider the supplemental petition to reopen.

In our earlier decision, we indicated that Armstrong tags all carpet leaving Dalton, GA, for temporary stor-

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[5] Texas requests that we reopen this proceeding at least to take official notice of Reeves' tariff under which the subject traffic moves. This is unnecessary. Both the tariff itself (ICC REEV 225, Item 6400) and the storage-in-transit provision applicable to it (ICC REEV 225, Item 910) are already part of the record. They are contained in pleadings filed by Armstrong and Reeves and were sent to all parties of record, including Texas.

age in transit at Arlington, TX. We found this fact, among others, to demonstrate that Armstrong forms the requisite intent that the carpet move in interstate commerce at the time the carpet leaves Dalton. Further, we indicated that Reeves subsequently is able to handle only 14 percent of the traffic moving out of Arlington. Intrastate carriers move the other 86 percent. Central argues that, because Armstrong's intent apparently disappears on 86 percent of the traffic once it leaves Arlington, our reasoning contains a fatal inconsistency. We disagree.

The fact that some shipments do not continue movement from Arlington under the transit tariff has no bearing on the shipper's intent concerning those shipments that do continue, and it is these continuing shipments and their movement that are in issue here. At the time the carpet leaves Dalton, Armstrong clearly intends all of it to continue movement in interstate commerce from Arlington. This intent is thwarted on some traffic at Arlington due only to Reeves' lack of sufficient equipment and to Armstrong's inability to find other interstate carriers willing to participate. In any event, it is clear that Armstrong forms its intent at Dalton, the point of initial departure, and that this intent, through circumstances beyond Armstrong's control, is thwarted only later on some traffic at Arlington.

The supplemental petition to reopen offers new evidence obtained through petitioners' recent deposition of two individuals who had prepared statements for Armstrong's initial comments in this proceeding. John Pokrifcsak's statement addressed generally the incidents of the involved transportation, while Howard S. Liddic's statement attested to the accuracy of certain statistical information contained in Mr. Pokrifcsak's

statement. Petitioners assert that both depositions bring to light material inaccuracies in and contradictions to the statements submitted earlier in this proceeding. We conclude, however, that this new evidence neither materially affects our prior action nor shows that it involved material error.

Petitioners assert that were this proceeding reopened they would expect to present additional evidence regarding 20 specific points. The majority of these offers of proof, however, contain evidence that is immaterial to the central issue in this case – whether at the time the shipments leave Dalton, Armstrong had formed the requisite intent that the shipments move in interstate commerce. The offers are generally unaccompanied by argument as to their materiality. The primary thrust of petitioners' supplemental petition appears to be an attack on Mr. Pokrifcsak's reliability as a witness. Armstrong has replied to petitioners' supplemental petition, and Mr. Pokrifcsak has submitted a supplemental statement clarifying certain of his deposition responses because he did not have the opportunity to do so earlier. The reply and supplemental statement satisfactorily resolve the points raised by petitioners. We continue to find Mr. Pokrifcsak's testimony as a whole very credible, reliable, and authoritative.

Before we address specific points that arguably have material bearing on the issue here, we will identify those that do not. Petitioners argue that the new evidence obtained at deposition materially contradicts earlier statements made by Mr. Pokrifcsak. In the majority of cases, this is just not so. For instance, paragraphs 2, 8, 9, 19, and 20 do not contradict prior testimony and, in fact, do not even contain new evidence. The matters contained therein are found in

Mr. Pokrifcsak's initial verified statement and in an October 30, 1985 motion of Armstrong.

The evidence proffered in paragraphs 10 through 18 does not contradict prior evidence. These paragraphs do contain new evidence (largely involving Mr. Pokrifcsak's knowledge of specific aspects of the day-to-day operations at the Arlington service center), but this new evidence does not alter, either individually or collectively, our initial finding concerning Armstrong's intent at Dalton. New evidence in and of itself is insufficient to warrant reopening at this stage of the proceeding. New evidence is a basis for reopening only if it show material error in our prior decision. The new evidence here does not. For example, in paragraph 12 petitioners alleged that Mr. Pokrifcsak does not know how a carrier tendered a shipment at Arlington could determine if the bill of lading covering the shipment from Dalton to Arlington bore a notation that the shipment was to be stored in transit. This new evidence is immaterial for two reasons. First, Mr. Pokrifcsak's lack of knowledge on this point does not affect Armstrong's intent at Dalton that the carpet move in interstate commerce. Second, it is not the responsibility of the carrier to determine which carpet was previously marked for storage-in-transit. That is the responsibility of Armstrong's personnel at Arlington. The other evidence proffered in the paragraphs identified above similarly has no material bearing on Armstrong's intent at Dalton.

Finally, paragraph 4 contains a misstatement made by Mr. Liddic at deposition. Although Mr. Liddic promptly corrected himself, petitioners omit that portion of this statement. As corrected, Mr. Liddic's statement at deposition is not inconsistent with earlier testimony.

We now address specific points raised by petitioners that potentially have a material impact on our prior decision. In paragraph 7, petitioners argue that Mr. Pokrifcsak was not personally knowledgeable of all the statements he made earlier, as he attested, but that they represented the composite knowledge of numerous individuals at Armstrong and E & B. Petitioners argue that this reduces the credibility of the information previously supplied to us. In his supplemental statement, Mr. Pokrifcsak explains that when he stated to the Commission that the matters he asserted were within his personal knowledge, he did not mean that he personally investigated each and every detail of every matter himself. As a senior company officer directly in charge of an E & B division whose operations cover half the country, Mr. Pokrifcsak states that obviously he could not be everywhere to experience firsthand everything that occurred every day. In order to acquire the knowledge that he needed to make business decisions, Mr. Pokrifcsak states that he relied on written or oral reports made daily by people on various levels of the organization. He states that he continues to rely on this type of reporting. Armstrong argues that once Mr. Pokrifcak has analyzed and accepted this information, it is within his own personal knowledge. We agree. Additionally, that information which is based on business records comes within an exception to the hearsay rule. *See United States* v. *Mortimer*, 118 F.2d 266, 269-70 (2nd Cir. 1941). In any event, we note that petitioners do not seek to strike Mr. Pokrifcsak's earlier affidavit, but only challenge the weight to be accorded it. As we stated earlier, we continue to find it reliable.

In paragraph 5, petitioners show that, at deposition, Mr. Pokrifcsak did not recall if he first saw Item 910 of Reeves' tariff (the storage-in-transit provision) on the

date he executed his affidavit, that he was not familiar with the tariff provision, and that he did not know what the application or effect of the provision might be. In his supplemental statement, Mr. Pokrifcsak explains that these particular responses at deposition resulted from a confusing line of questioning by petitioners' attorneys. When asked if he was familiar with Item 910, he stated no because the term "Item 910" meant nothing to him at that time. He assures us, however, that he is familiar with the effect of Reeves' tariff provision and knows that it is crucial to establishing the storage-in-transit privilege. Moreover, Armstrong, argues that the specific time Mr. Pokrifcsak first saw Item 910 is immaterial as long as he was familiar with it when he made his statement. We agree.

Next, petitioners state in paragraph 6 that although Mr. Pokrifcsak swore in his affidavit that "the outbound billing documents make reference to the inbound billing documents", at deposition he was unaware of any reference on a bill of lading created at Arlington to any bill of lading, freight bill, or manifest covering shipments of the same carpet from Dalton to Arlington. Armstrong replies that petitioners mistakenly equate "billing documents" with "bills of lading", and that the two are not the same. Armstrong notes that Mr. Pokrifcsak testified at deposition that the outbound bills of lading make reference to the movement of the carpet from Dalton. In his supplemental statement, Mr. Pokrifcsak adds that the bills of lading for shipments from Arlington reference the number of the manifest covering the shipment of the roll from Dalton. In addition, Armstrong refers us to Mr. Liddic's testimony at deposition that E & B ships from Dalton to Arlington only about twice a week. Thus, Armstrong states, by referring to the date that a shipment moved to the service

center, as shown on Arlington's outbound bills of lading, one can normally identify the particular shipment from Dalton in which the carpet arrived. This method of connecting inbound and outbound shipments is supplemented by the computerized inventory tracking system maintained at the service center, as described by Mr. Pokrifcsak in his original verified statement. In conclusion, then, Armstrong states that E & B can determine which particular shipment from Dalton contained any roll of carpet that subsequently is shipped from Arlington.

In paragraph 1, petitioners show that the bills of lading attached as exhibits to the depositions that cover shipments of carpet from E & B's facility at Dalton to its Arlington service center do not reveal whether the carpet is sidemarked or non-sidemarked, contrary to Mr. Pokrifcsak's prior assertion. However, petitioners conceded that previously sidemarked carpet continued in interstate commerce from Arlington, and we concluded that the shipper's intent demonstrated that the non-sidemarked carpet continued in interstate commerce as well. Even if all the carpet were non-sidemarked when it left Dalton, it still would continue in interstate commerce from Arlington. Thus, petitioners' claim of error is immaterial. In any event, Mr. Pokrifcsak explains that sidemarking *is* shown on the freight manifest, which is very similar to the bill of lading, and that he apparently interchanged the terms. In addition, we note that Mr. Pokrifcsak also previously stated that carpet was sidemarked by tagging individual rolls.

Petitioners next state in paragraph 3 that bills of lading prepared at Dalton commencing in June 1984 were corrected in October 1985 by adding the notation "shipped to Arlington, Texas, service center for storage

in transit" or similar language, but that, on September 26, 1985, Mr. Pokrifcsak had stated that under implemented procedure, the bills of lading were marked for storage-in-transit when they left Dalton. In his supplemental statement, Mr. Pokrifcsak indicates that what he was referring to was the procedure implemented as of the date of his statement. In any event, our review of the bills of lading attached as exhibits to Mr. Liddic's deposition shows that the corrected notation appears on some but not all bills prior to September 26, 1985, and that those not corrected did originally bear the storage-in-transit notation. It appears, then, that the described procedure was applied inconsistently before September 26, 1985.

In any event, it is necessary not to lose sight of the real significance of the storage-in-transit notation. While it serves as evidence of the shipper's intent at Dalton that the traffic continue movement beyond Arlington in interstate commerce, at no time have we said that this notation is or can be the only evidence of the shipper's intent. In fact, as shown by the facts and circumstances surrounding the involved transportation, the shipper's intent could not be clearer. The stopover at Arlington is but a temporary break in one continuous interstate movement.

It is beyond the scope of this declaratory order proceeding for us to determine whether every individual shipment has moved lawfully in interstate commerce pursuant to Reeves' certificate. Our concern here is with the nature and concept of the disputed transportation as a whole and whether the certificate we have issued for interstate transportation can be properly construed to embrace that kind of service. Nothing petitioners have adduced here gives us cause to reexamine

our prior determination as to the permissible scope of the certificate that we issued.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. All late-tendered pleadings are accepted for filing.
2. Armstrong's motion to strike the supplemental petition to reopen is denied.
3. Texas's motion that the Commission recuse itself from any further consideration of this proceeding is denied.
4. Armstrong's motion to take official notice of two court cases is granted.
5. The motion to intervene are granted. The Regular Common Carrier Conference, National Motor Freight Traffic Association, National Industrial Transportation League, National-American Wholesale Grocers' Association, National Small Shipments Traffic Conference, Inc., Drug and Toilet Preparation Traffic Conference, Inc., United States Department of Transportation, and Southwire Company are made parties of record.
6. The petitions to reopen, including the supplemental petition, are denied.
7. This decision is effective on its date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Simmons commented with a separate expression. Vice Chairman Lamboley concurred in the result.

(SEAL)

Noreta R. McGee
Secretary

COMMISSIONER SIMMONS, commenting:

Many commentators have expressed the view that in the prior decision the Commission undertook a new policy or approach in determining what constitutes interstate transportation. Presumably, this different approach represented an attack by the federal government on a State's authority to regulate intrastate transportation in light of the 1980 Motor Carrier Act. This, however, was not the case. Our prior decision rested on well-settled law. We found that the shipper made every conceivable effort to establish its intention that at the time the shipments leave Dalton, GA they were to be part of a continuous interstate movement. The shipper clearly demonstrated that intent by, among other things, complying with Reeves' storage-in-transit provision. Absent some evidence of fraud or subterfuge to evade state jurisdiction, these transit practices have long been permitted even when there was an interruption in the physical continuity of the movement at the transit point. No party has presented any new evidence to contradict the Commission's earlier conclusions.

Let me emphasize that my earlier conclusion was not based on some ideological hostility to a State's reasonable determination to regulate intrastate transportation. Nor did it rest on an intent to preempt Texas' primary jurisdiction. On the contrary, the result here would have been the same fifteen years ago.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-86-CA-446

E & B CARPET MILLS, A DIVISION OF ARMSTRONG WORLD INDUSTRIES, INC., AND REEVES TRANSPORTATION COMPANY OF GEORGIA, PLAINTIFF

v.

JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS, NORBERTO FLORES AND DOUGLAS FRASER, ASSISTANT ATTORNEYS GENERAL OF THE STATE OF TEXAS, CENTRAL FREIGHT LINES, INC., A TEXAS CORPORATION AND RED ARROW FREIGHT LINES, INC., A TEXAS CORPORATION, DEFENDANTS

FILED Oct. 8, 1986

ORDER

In March, 1985, Plaintiffs, Reeves Transportation Company of Georgia (Reeves) and E&B Carpet Mills (E&B) sought a ruling from the Interstate Commerce Commission (ICC) whether certain trucking services performed by Reeves for E&B constituted intrastate or interstate transportation. The specific issue was whether the service from Georgia into Texas provided under Reeves' ICC certificate encompasses the storage-in-transit and subsequent movement to final delivery sites in Texas as part of interstate commerce. In April,

1986, the ICC ruled that Reeves' service is entirely interstate. Other administrative review of that decision is pending.

In October, 1985, the State of Texas filed suit against Reeves and its principal shipper E&B for injunctive relief and penalties under state law for Reeves' failure to comply with Texas' intrastate shipping regulations. The Defendant private carriers in this case, Central Freight Lines, Inc., Red Arrow Freight Lines, Inc., and Merchants Fast Motor Lines, Inc., have intervened in that suit in support of the State of Texas.

On August 18, 1986, Reeves and E&B filed this suit seeking preliminary injunctive relief against the defendants from pursuing the state court litigation and money damages for their actions against Reeves and E&B. The ICC sought to intervene in this lawsuit on August 19, 1986.

In order that a preliminary injunction may issue, the Court must be convinced that the four requirements set out in *Apple Barrell Productions, Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1985), *citing Dallas Cowboy Cheerleaders v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979), are met. The moving party has the burden of proving:

1. a substantial likelihood of success on the merits;
2. a substantial threat that the movant will suffer irreparable injury if the injunction is not issued;
3. that threatened injury to the movant outweighs any damage the injunction might cause to the opposition;
4. that the injunction will not disserve the public interest.

The Court, after examining the entire record, finds that the Plaintiff has failed to establish irreparable

harm at this time and that the preliminary injunction should be denied. While the harm to the Plaintiff may be difficult to prove, the Court finds that damages could be determined. Accordingly,

IT IS ORDERED that Plaintiff's Motion for a preliminary injunction be and hereby is DENIED.

IT IS FURTHER ORDERED that both sides submit briefs on or before October 17, 1986 on the following:

1. whether the Plaintiff had pleaded a proper 42 U.S.C. § 1983 claim based on the deprivation of property without due process of law, in violation of the due process clause of the fourteenth amendment;
2. whether Eleventh Amendment immunity attaches to the state defendants;
3. whether this Court should abstain under the *Younger* doctrine in light of the recent 5th Circuit case, *New Orleans Public Service, Inc. v. the City of New Orleans, et al.*,

SIGNED this 7th day of October, 1986.

/s/ WALTER S. SMITH, JR.

WALTER S. SMITH, JR.
United States District Judge

APPENDIX H

IN THE DISTRICT COURT
TRAVIS COUNTY, TEXAS
353RD JUDICIAL DISTRICT

NO. 389,524

THE STATE OF TEXAS

v.

E & B CARPET MILLS, A DIVISION OF ARMSTRONG WORLD INDUSTRIES, INC., AND REEVES TRANSPORTATION COMPANY OF GEORGIA

JUDGMENT

BE IT REMEMBERED that on the 18th day of February, 1988, came on to be heard the motions for summary judgment, including all amendments and supplements thereto, of the State of Texas, Plaintiff, Central Freight Lines and Merchants Fast Motor Lines, Inc., Intervenors, and of E & B Carpet Mills, a Division of Armstrong World Industries, Inc., Defendant, in the referenced matter. Plaintiff, Defendants and Intervenors all appeared by and through their respective attorneys of record.

The Court, having received the summary judgment evidence of the parties and the argument of counsel, and having considered the prevailing and applicable authorities, is of the opinion, and finds that:

1. The Motion for Summary Judgment of E & B Carpet Mills, a Division of Armstrong World Industries, Inc., Defendant, should be, and hereby is, OVERRULED; and

2. The Motion for Summary Judgment of The State of Texas, Plaintiff, should be, and thereby is, GRANTED.

It is, therefore, ORDERED that:

1. Reeves Transportation Company of Georgia, its officers, agents, employees and representatives should be, and are hereby PERMANENTLY ENJOINED, and ORDERED to cease and desist, instanter, from further transporting for compensation or hire, over public highways between incorporated cities within the State of Texas, carpet or floor covering commodities manufactured outside the State of Texas, and for which a specific purchaser or destination other than a point of storage has not been designated or identified at the time of its shipment from its out-of-state origin into Texas, without first obtaining the appropriate certificates or permits from the Railroad Commission of Texas authorizing such transportation; and
2. E & B Carpet Mills, a Division of Armstrong World Industries, Inc., its officers, agents, employees and representatives should be, and are hereby PERMANENTLY ENJOINED, and ORDERED to cease and desist, instanter, from aiding, abetting, hiring, procuring or compensating motor carriers to transport, over public highways between incorporated cities within the State of Texas, carpet or floor covering commodities manufactured outside the State of Texas, and for which a specific purchaser or destination other than a point of storage has not been designated or identified at

the time of its shipment from its out-of-state origin into Texas, without such motor carriers first obtaining the appropriate certificates or permits from the Railroad Commission of Texas authorizing such transportation; and

IT IS FURTHER ORDERED that Plaintiff, The State of Texas, shall have and recover of and from Defendants, E & B Carpet Mills, a Division of Armstrong World Industries, Inc., and Reeves Transportation Company of Georgia, all costs of court expended on Plaintiff's behalf in this cause, for which let execution issue.

All relief prayed for by any party but not expressly given herein is hereby DENIED.

The Clerk shall forthwith issue a writ of injunction in conformity with the law and the terms of this Order.

SIGNED this 11 day of May, 1988.

/s/ JERRY A. DELLANA
Jerry A. Dellana
Judge Presiding

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